ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996	)	CC Docket No. 96-187

AT&T CORP. REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

AT&T Corp. ("AT&T") hereby replies to the oppositions to its March 10, 1997 petition for reconsideration of the Report and Order[1] ("Order") in this proceeding.

I. THE COMMENTS CONFIRM THAT THE ORDER'S READING OF "DEEMED LAWFUL" IS NOT A PERMISSIBLE INTERPRETATION OF § 402(b)(1)(A)

In their petitions, AT&T and MCI demonstrate that the Order erred in its interpretation of § 402(b)(1)(A)'s provision that certain LEC tariffs shall be "deemed lawful." The non-ILEC commenters unanimously support AT&T's and MCI's contentions,[2] while the

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1 Report and Order, Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, FCC 97-23, released January 31, 1997. A list of parties submitting comments and the abbreviations used to identify them are set forth in an appendix to this reply. All citations to parties' pleadings are to oppositions to petitions for reconsideration, unless otherwise indicated.

2 See CompTel, pp. 2-5; Hyperion, pp. 2-5; Sprint, pp. 1-7; TRA, pp. 5-10; WorldCom, pp. 3-8.

BOCs and GTE argue that tariffs filed pursuant to § 402(b)(1)(A) are thereafter insulated from all claims for damages.[3] The ILECs, however, fail to respond to many of the petitions' arguments, and offer wholly unpersuasive responses to those points they do address.[4]

As a preliminary matter, although two ILECs attempt to argue that the Order's reading of § 402(b)(1)(A) is compelled by the plain language of the statute,[5] the NPRM readily and correctly found that dictionary definitions of "deem" demonstrate that the term can be interpreted to create either a conclusive or a rebuttable presumption.[6] As the Supreme Court has held, "[t]he existence of alternative dictionary definitions[,] ... each making some sense under the statute, itself indicates that the statute is open to interpretation."[7]

The Commission's interpretation of "deemed lawful" chiefly rests on its reading of two appellate decisions, which it discusses in a single footnote. These cases, Municipal Resale[8] and Ohio Power,[9] considered a FERC regulation governing the price which an electric utility

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3 See Bell Atlantic / NYNEX, pp. 2-6; BellSouth, pp. 2-6; GTE pp. 1-4; SWBT, pp. 2-9. Ameritech does not oppose AT&T and MCI on this issue.

4 Bell Atlantic and NYNEX contend that AT&T's petition simply restates arguments made in its comments. Bell Atlantic / NYNEX, p. 3. In fact, the petition chiefly addresses the Order's attempt to rest its conclusion on two appellate decisions not mentioned in the NPRM or addressed (to AT&T's knowledge) in any party's comments or ex parte filings.

5 See BellSouth, p. 2; GTE, p. 2.

6 See NPRM, ¶ 110 (citing Black's Law Dictionary); AT&T Comments at 6, n.13. SWBT also appears to agree that "deem" is ambiguous. See SWBT, p. 2.

7 National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 408 (1992).

8 Municipal Resale Service Customers v. FERC, 43 F.3d 1046 (6th Cir. 1995).

9 Ohio Power Co. v. FERC, 954 F.2d 779 (D.C. Cir. 1992).

could impute to coal purchased from its subsidiary, which "deemed" certain transfers reasonable. AT&T's petition discussed these cases at length, providing specific, substantive grounds on which they must be distinguished from § 402(b)(1)(A). To the limited extent that the ILEC commenters even address these contentions, they offer arguments that are easily dismissed.

Among other things, AT&T's petition observed (pp. 4-5) -- and no party to this proceeding disputes -- that, unlike the instant Order, Municipal Resale and Ohio Power did not rule that the coal prices at issue had been placed beyond the reach of future agency proceedings. Bell Atlantic and NYNEX attack a straw man, arguing that AT&T distinguished these decisions "as only applying where another agency has made a previous ruling."[10] In fact, AT&T showed that those cases simply held that the SEC, rather than FERC, was the agency empowered to review the disputed transfers, and that FERC thus lacked jurisdiction to alter them. As AT&T's petition also stated -- and no party disputes -- after Municipal Resale was decided, the ratepayers that brought that case sought SEC review of the respondent utilities' pricing.[11]

AT&T also demonstrated in its petition (p. 5) that although both Ohio Power and Municipal Resale indirectly concern rate-making, neither case suggests that the word "deem" has a specialized meaning in the tariffing context. SWBT makes the utterly unsupported assertion that these decisions "specifically address the reasonableness of rates."[12] This claim is pure ipse

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10 See Bell Atlantic / NYNEX, p. 3.

11 SWBT asserts that Municipal Resale and Ohio Power support the Order in that the cases seek "to avoid duplicative regulatory proceedings." SWBT, p. 4. However, its interpretation would not avoid redundant proceedings, but rather would eliminate entirely the complaint remedy provided by statutory and common law for more than a century.

12 SWBT, p. 8.

dixit, and so provides no support for the Commission's interpretation of § 402(b)(1)(A). In fact, those cases did not address whether particular rates were reasonable, but whether FERC had jurisdiction over them.

Although BellSouth makes no effort to rebut AT&T's interpretation of Ohio Power and Municipal Resale, it contends those cases demonstrate that as a "fundamental" legal matter, "deem" must be interpreted as a conclusive presumption.[13] BellSouth offers no substantive support for this claim. Attachment 1 to BellSouth's opposition does, however, attempt to distinguish the cases AT&T cites in its petition, which hold that "deem" creates a rebuttable presumption. It is clear that BellSouth's purported "distinctions" do not support its claims, but rather prove that "deem" does not automatically create a conclusive presumption

BellSouth's Attachment 1 demonstrates that courts do not view the word "deem" as having a self-evident meaning, but rather interpret that term by looking to contextual evidence, legislative intent, and other standard tools of statutory interpretation. For example, BellSouth claims that Miller v. Commonwealth is distinguishable because the court in that case stated that it involved "peculiar circumstances."[14] Yet, the "circumstances" that the court referred to were that reading "deemed" to create a conclusive presumption would lead to "injustice, inconvenience, hardship, and ... absurdities" and would deny rights provided by statute.[15] AT&T and MCI have

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13 BellSouth, p. 3.

14 2 S.E.2d 343, 349 (Va. 1939).

15 Id. at 348 (citing Virginia Code 1936, § 4778).

urged these very grounds as the basis on which the Commission must find that § 402(b)(1)(A) creates only a rebuttable presumption that a tariff is lawful.

Similarly, BellSouth argues that Brimm v. Cache Valley Banking Company[16] should be distinguished because that decision finds "deem" creates a rebuttable presumption in order to "harmonize multiple statutory provisions" and implement what it perceived to be the "legislative intent."[17] Again, this is conclusive evidence that courts do not regard "deem" as unambiguous, but instead have found that the term requires interpretation using standard tools of statutory construction. For example, according to BellSouth, "deem" has been held to create a rebuttable presumption in order to avoid rendering other provisions surplusage,[18] to avoid creating a conflict within a statute,[19] or to avoid finding a repeal by implication.[20]

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16 269 P.2d 859 (Utah 1954).

17 BellSouth Attachment 1, p. 4.

18 Rayle v. Rayle, 202 S.E.2d 286, 289 (N.C. Ct. App. 1974) (construing "deem" to create an irrebuttable presumption "would render meaningless many portions of the act ...."); see BellSouth Attachment 1, p. 3.

19 Conoco, Inc. v. Skinner, 970 F.2d 1206 (3rd Cir. 1992); (described in BellSouth Attachment 1, p. 2 as "interpret[ing] conflicting statutory provisions to give maximum effect to all provisions.").

20 Erickson v. Erickson, 115 P.2d 172, 177-78 (Or. 1941) (relying on "presumption that the earlier act was not repealed by the latter"); see BellSouth Attachment 1, p. 3. Bell Atlantic and NYNEX erroneously suggest at page 4 of their opposition that AT&T contended that Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968), also held that "deem" creates a rebuttable presumption. AT&T stated merely that this case, which the Commission cites in support of the Order, is equivocal, as it nowhere specifically discusses the meaning of the term "deemed," and in fact suggests that the statute in question establishes a rebuttable presumption. See AT&T Petition, p. 6, n.15.

The Commission cannot reasonably conclude that the relevant case law compels the conclusion that "deemed lawful" requires a conclusive presumption. The record in this proceeding establishes clearly that such a presumption is neither required nor permissible when it would violate ordinary rules of statutory interpretation. Moreover, the ILEC commenters simply cannot rebut AT&T's and MCI's showing that the Order's reading of § 402(b)(1)(A) would repeal a longstanding common law right,[21] repeal significant elements of the Communications Act by implication, nullify an unbroken line of Supreme Court decisions, and require results that are otherwise both absurd and oppressive.

It is telling that no ILEC even attempts to explain why Congress supposedly intended to permit them to retain profits obtained for tariff filings later shown to impose unreasonable rates. BellSouth and SWBT suggest that local competition will, in some unexplained fashion, prevent ILECs from imposing such rates, and that the Order's interpretation of § 402(b)(1)(A) is somehow procompetitive.[22] However, despite SWBT's risible claim that local markets are fully competitive,[23] it is beyond cavil that ILECs currently exercise market power, and will continue to do so for the foreseeable future. Competitive forces therefore cannot

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21 SWBT contends that its proposed reading of "deemed lawful" would not alter existing law because the Commission's decision not to suspend a tariff would function as a formal finding of lawfulness. SWBT, pp. 6-7. Of course, this is the very element of its proposal that constitutes a radical break with over one hundred years of settled precedent. See AT&T Petition, pp. 7-10; AT&T, pp. 1-6.

22 See BellSouth, pp. 5-6; SWBT, pp. 4, 6, 9.

23 SWBT, p. 5.

be relied upon to restrain ILECs' pricing. More importantly, the ILECs ignore the fundamental fact that the immunity from damages that they seek does not exist in competitive markets (nor has it ever existed in any U.S. market, whether tariffed or not).[24]

The oppositions raise three further issues of note: First, BellSouth argues that § 402(b)(1)(A) is "superfluous" unless it creates a conclusive presumption of lawfulness, because tariffs that take effect without suspension already are presumed lawful in complaint proceedings.[25] This contention ignores the fact that dominant carriers' tariffs are not currently presumed lawful during pre-effectiveness review, while AT&T's interpretation of § 402(b)(1)(A) would extend that presumption to such filings. Second, two ILEC commenters agree with AT&T and MCI that if tariffs filed pursuant to § 402(b)(1)(A) are conclusively lawful when they become effective, then they are immediately eligible for judicial review at that time.[26] Finally, two ILECs make the untenable argument that LECs may file tariffs for interexchange services on a "streamlined" basis.[27] AT&T strongly endorses MCI's request that the Commission clarify that § 402(b)(1)(A) applies only to LECs' provision of exchange access service.[28]

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24 See AT&T Petition, p. 10; CompTel, p. 3, n.6 (noting that Commission's detariffing order made clear that state law contract remedies would apply to detariffed transactions).

25 BellSouth, p. 6.

26 BellSouth, p. 4; SWBT, pp. 4-5 (arguing failure to suspend is affirmative finding of lawfulness under § 402(b)(1)(A)).

27 See BellSouth, pp. 7-8; SWBT, p. 12.

28 See MCI Petition, pp. 19-20; CompTel, pp. 6-7; TRA, p. 8.

II. THE COMMISSION SHOULD ALLOW AT LEAST TWO BUSINESS DAYS FOR PREPARATION OF OPPOSITIONS TO § 402(b)(1)(A) TARIFFS

Three ILEC commenters oppose AT&T's request that parties opposing § 402(b)(1)(A) tariff filings be permitted at least two business days to prepare their petitions;[29] however, their oppositions fail to address the primary basis for AT&T's contention. The Order requires that petitions opposing LEC tariffs be filed within three calendar days. No ILEC commenter disputes[30] that given this timetable, LECs will seek to file their tariffs just before the close of business on Fridays, leaving petitioners at most a single business day in which to receive notice, obtain a copy of the LEC's filing, and prepare and file their oppositions. As AT&T showed in its petition (p. 10), the Order expressly found that a single business day is insufficient to prepare such pleadings. Ameritech argues that § 402(b)(1)(A) requires that tariffs "shall" take effect within 7 days.[31] However, that section specifies only that tariffs take effect within 7 days of filing, and does not limit the Commission's ability to promulgate rules governing filing procedures so as to ensure adequate pre-effectiveness review.

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29 See Ameritech, p. 8; Bell Atlantic / NYNEX, p. 10; SWBT, pp. 10-11. The non-ILEC commenters that address this issue unanimously support AT&T. See CompTel, p. 6; Hyperion, pp. 5-6; TRA, pp. 10-11.

30 Bell Atlantic and NYNEX contend that it is "speculation" that LECs will file tariffs on Fridays. Bell Atlantic / NYNEX, p. 10. However, they do not state that they will not employ this strategy. Moreover, if LECs do not intend to exploit this aspect of the Order, then they should have no quarrel with a rule that limits their ability to do so.

31 Ameritech, p. 8.

III. RATE-OF-RETURN LECs SHOULD BE REQUIRED TO FILE TRP MATERIALS 90 DAYS IN ADVANCE OF THEIR ANNUAL ACCESS TARIFF FILINGS

Even those ILECs that oppose the Order's requirement that price cap LECs file their TRPs 90 days in advance of annual access filings agree that there is no basis for the Commission's distinction between price cap and non-price cap LECs in this regard.[32] Otherwise, SWBT simply repeats the argument, which the Commission already has considered and rejected, that although § 402(b)(1)(A) makes no reference to cost-support data, it nevertheless should be construed to forbid the advance filing of TRPs.[33]

IV. LECs SHOULD FILE SUPPORTING MATERIALS IN ADVANCE OF ANY MID-TERM TARIFF FILING THAT REQUIRES A CHANGE IN THEIR PCIs

As AT&T showed in its petition, the same reasoning the Commission adopted in requiring advance filing of TRPs applies with equal force to mid-term LEC tariff filings that propose changes to PCIs.[34] Three ILECs oppose this request, but they offer no reasoned basis for their opposition. Although Ameritech alleges that AT&T's request is "inconsistent" with § 402(b)(1)(A), the Commission already has found that advance filing of information that does not include rates is permissible, and Ameritech does not oppose that conclusion.[35] Bell Atlantic and NYNEX assert that AT&T's proposal would limit LECs' "ability to compete on the basis of

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32 See Ameritech, p. 3; SWBT Petition, p. 5, n.11; see also TRA, p. 11; WorldCom, p. 9.

33 SWBT, p. 11.

34 BellSouth inexplicably claims that this issue was not addressed in this proceeding. See BellSouth, p. 8. In fact, AT&T made these same contentions in its comments, and cited those comments in its petition. AT&T Petition, pp. 13-14; AT&T Comments, pp. 18-19.

35 See Ameritech, pp. 2, 4.

price," because competitors might be able to anticipate upcoming changes in rates.[36] However, because PCI changes occur by operation of law, not as a result of LECs' strategic decisions, and because advance filing of the relevant data at most would reveal only the direction and rough magnitude of a coming rate change, any effect on price competition will be minimal and is outweighed by the Commission's obligation to ensure the accuracy of these crucial tariff filings.

CONCLUSION

For the foregoing reasons, and the reasons stated in AT&T's petition and opposition, the Commission should reconsider its First Report and Order in CC Docket No. 96-187.

Respectfully submitted,

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April 21, 1997

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[36] Bell Atlantic / NYNEX, p. 7.

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(CC Docket No. 96-187)

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BellSouth Corporation & BellSouth Telecommunications, Inc. ("BellSouth")
The Competitive Telecommunications Association ("CompTel")
GTE Service Corporation ("GTE")
Hyperion Telecommunications, Inc., KMC Telecom, Inc., and McLeodUSA Telecommunications Services, Inc., ("Hyperion")
MCI Telecommunications Corporation ("MCI")
Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell ("SWBT")
Sprint Corporation ("Sprint")
Telecommunications Resellers Association ("TRA")
WorldCom, Inc. ("WorldCom")

CERTIFICATE OF SERVICE

I, Terri Yannotta, do hereby certify that on this 21st day of April, 1997, a copy of the foregoing "AT&T Corp. Reply To Oppositions To Petition For Reconsideration" was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached service list.

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April 21, 1997

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